82 - 1553
No.

In The

Supreme Court of the United States

October Term, 1982

NICHOLAS LANZIERI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the courts below misconstrued Rule 608 of the Federal Rules of Evidence when they denied the petitioner an opportunity to conduct a psychiatric examination of the main Government witness, James McBride, who had admitted that he had lied on a number of occasions, including to the trial court itself, as well as to the Government, and also acknowledged that he had a pathological fear of incarceration to the point that he would do and say almost anything to avoid imprisonment (Fifth and Sixth Amendments, United States Constitution)?

2. Whether a denial of a psychiatric examination of the main Government witness, James McBride, constituted a violation of the petitioner's right to confront and cross-examine this witness effectively?

3. Whether petitioner's rights under the Fifth and Sixth Amendments were abridged by trial court rulings that, in essence, made it more difficult for him to gain access to certain important witnesses?

4. Whether petitioner's sentence amounting to six years imprisonment violated due process of law by virtue of the exchange between the trial judge and the petitioner concerning the latter's religious propensities and whether he was a true Catholic?

5. Whether there was sufficient evidence to have warranted presenting this case to a jury, in view of the fact that there was virtually no substantive evidence connecting Lanzieri to the crimes charged?

PARTIES

The petitioner herein had been indicted along with one Joseph Martinez, Donald Habe, Frank DeSena, and Wayne David Kinney, for theft of a foreign shipment, theft from Customs custody, and conspiracy to commit theft. For the purpose of this petition, however, the only defendant-appellant involved in the trial was the petitioner, Nicholas Lanzieri, because there was a mistrial as to him during an initial trial and he was tried separatedly and apart from everyone else during a second trial, from which this petition is being pursued. Thus, the parties herein are only NICHOLAS LANZIERI and the UNITED STATES OF AMERICA, and no one else.

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OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Second Circuit is annexed hereto as an appendix.

JURISDICTION

(a) The judgment of conviction was rendered May 10, 1982, convicting the petitioner of conspiracy to possess and transport a quantity of silver (scrap) stolen from an interstate or foreign

shipment, knowing that the silver was stolen, and also one substantive count of transportation of the aforesaid silver, after trial before Honorable Mark Costantino and a jury.

The petitioner had been indicted for the aforesaid crimes along with several co-defendants, but was ultimately tried alone because as to him there was a mistrial during a first trial, and a retrial was required.

The charges were predicated primarily upon the testimony of one James McBride, an extremely unstable personality, who testified against the petitioner, that petitioner knowingly participated along with him and the others in the transportation and misappropriation of certain scrap silver, which was flowing in from foreign and from interstate commerce.

(b) The order of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Eastern District of New York was rendered November 12, 1982. A copy of the opinion of the court, as well as the order of affirmance, is annexed hereto as appendices.

A petition for rehearing was filed, but was denied by the United States Court of Appeals on January 17, 1983. A copy of the order denying rehearing is also annexed as an appendix.

(c) Jurisdiction to review the judgment and order in question by certiorari is conferred under 28 U.S.C. §§1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments of the United States Constitution, and Sections 659 and 2314 of Title 18 of the United States Code, as well as Rule 608(a) of the Rules of Evidence,

are involved herein. These are reproduced in the appendix, so far as relevant herein.

STATEMENT OF THE CASE

The petitioner was tried twice on the charges in the within indictment. On the first occasion there was a conviction as to co-defendants, but a mistrial as to him. At the second trial, which is the subject for the petition for certiorari herein, petitioner was tried alone and was convicted.

The main evidence against petitioner stemmed from testimony of one James McBride, who was an accomplice as a matter of law, and the main Government witness.

McBride had testified that he lived near the petitioner in Staten Island and worked at John F. Kennedy International Airport for "JFK Deliveries", as a truck driver. McBride admitted that he had stolen a quantity of silver residue and silver flakes from Seaboard Airlines at Kennedy Airport, for which theft he was charged and ultimately pleaded guilty. He was facing 5 years imprisonment and a $10,000 fine at the time of his testimony, but had not yet been sentenced (39, 40).[1]

His exposure originally had been to a possible 17-year sentence, prior to his guilty plea (41).

McBride asserted that he had spoken to several people, including one Joe Martinez, who was an agent at Seaboard World Airlines. Later McBride declared that he spoke to petitioner, Nicholas Lanzieri, but referred to some "cobalt" which McBride

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1. Numerals in parentheses refer to pages of the official court reporter's minutes of trial, unless otherwise indicated.

informed Lanzieri he was trying to sell. It was his desire to obtain the assistance of Lanzieri in selling this cobalt, but there was no indication that Lanzieri was informed that the commodity had been stolen. The scrap silver itself was contained in blue vinyl-type barrels with black plastic tops (44).

Later, McBride stated that he informed Lanzieri that he had scrap silver and wanted to know if Lanzieri could help him get rid of it (51). Petitioner allegedly answered in the affirmative. McBride never testified that Lanzieri actually knew the silver was stolen, or the true value thereof.

McBride was substantially evasive on a number of aspects of his testimony. For example, he claimed to have taken the shipment in question to the firm where defendant worked on July 17th. He stated that there was someone there, whom he had never seen before and could not identify. Not only could he not identify him, but he could not even give an estimate as to the man's height, weight, color of his skin, or race (McBride, 52-54).

McBride further declared that he was with Mr. John Fraterino [sic] for about twenty minutes that day (56).

The witness had great difficulty in even recalling what had occurred and the date that he claims to have had a monetary transaction with Lanzieri (56-62).

Illustrative of McBride's inaccuracies and unreliability, the following occurred at 131 of the transcript:

> "Q. And you completely, entirely, were wrong on every single portion and total of payments the first time you ever talked to law enforcement officials about this, isn't that right? A. Yes."

Furthermore, McBride admitted that he had deliberately lied to the court about his ability to hire a lawyer, and had lied in other respects as well (131, 132):

> "Q. You lied to the court when you started to cooperate, isn't that a fact? A. Yes.
>
> Q. And you did that intentionally, didn't you? A. Yes.
>
> Q. So when you just said five minutes ago that you wouldn't do it intentionally, you were lying then, weren't you? A. Well, not really."

Moreover, McBride admitted that he was terrified of going to jail because he suffered from claustrophobia and "cannot abide the thought of being in a confined place" (135).

Additionally, McBride admitted that the thought of going to jail was like a "living hell. . .it would be unbearable" and that he was "terrified of going to jail" (136).

Anomalously, McBride nevertheless insisted that despite his pathological fear of confinement in jail, and despite the fact that he had stolen many times and had lied to the court, he was nevertheless telling the truth to the jury (136).

Anthony Fiattarone testified out of the presence of the jury on behalf of the prosecution. He stated that he was employed by DRD Fast Freight in 1980 as a truck driver and sometimes worked in the vicinity of the airport. He remembered a person by the name of "Mac" (presumably McBride), but denied any recollection of having been asked by Mr. Habe to accompany him and "Mac" by driving someone's car and following the DRD truck (185). In essence he denied any recollection of events that McBride claimed occurred (186).

There was no further substantive testimony specifically linking the petitioner with involvement in this case.

While the petitioner himself did not take the stand, he called his mother-in-law, Martha Hoffman, who stated that the petitioner was in Florida in the latter part of July and certainly up to and including August 5th, 1980 (438-444, 448-460).

This testimony, in essence, was by way of alibi because it precluded the petitioner from having been in New York at a point in time when McBride claimed that he was with the petitioner.

Returning for a moment to Fiattarone, it should be noted that the Government obtained his testimony by conferring immunity upon him (176, 177), but, ironically, the court would not permit defense counsel to read his testimony to the jury when an application was made sometime later.

While it is true that Mr. Cohen, the trial attorney for the petitioner, did not make this application until the virtual close of the defense case, the court, we submit, erred in holding that in essence the defense had waived the right to have this testimony presented to the jury because of the point in time that the request was made (423-430) (*Chambers v. Mississippi*, 401 U.S. 284, 35 L. Ed. 2d 297).

Fiattarone had given testimony on behalf of the Government, under a grant of immunity, but the court would not permit defense counsel at trial to read that testimony to the jury because the application had been made after the witness had left the stand.

In short, the trial testimony revealed that McBride and petitioner may have had some contacts concerning the disposition of certain scrap silver, but there was no affirmative testimony that petitioner actually knew the silver was stolen or that McBride was a thief.

REASONS FOR GRANTING THE WRIT

I.

It was error and a denial of petitioner's constitutional rights under the Fifth and Sixth Amendments, as well as Rule 608(a) of the Federal Rules of Evidence, for the trial court to have denied petitioner's request to have a psychiatric examination of the main Government witness, James McBride.

The main and primary witness against the petitioner was one James McBride, who testified against the petitioner herein. It is inconceivable that there could have been a conviction of the petitioner without the testimony of James McBride.

McBride frankly admitted that he had lied on several occasions to the court itself, and had lied to the Government.

In addition, McBride stated that he had a pathological fear of incarceration, to the point that he would do and say almost anything to avoid imprisonment.

Pursuant to Rule 608 of the Federal Rules of Evidence, counsel below asked for a psychiatric examination of McBride. This was denied categorically by the trial court below, without so much as a hearing.

With the adoption of the Federal Rules of Evidence, the rules governing an attack upon a witness' character for truthfulness were codified. F.R. Evid. 608 provides in pertinent part as follows:

> "(a) . . . The credibility of a witness may be attacked . . . by evidence in the form of *opinion* or reputation. . . ." (Emphasis supplied.)

F.R. Evid. 608 does spell out certain limitations upon the foregoing. However, it makes clear that the evidence offered may refer to a witness' propensity for untruthfulness. Legal commentators have observed the F.R. Evid. 608 is a "necessary limitation upon the broad rule of competency provided" by F.R. Evid. 601. Thus, although a witness may be legally competent to testify, he might still lack the character trait or traits necessary to prevent him from testifying falsely, especially if there were some advantage to be gained by falsification. 10 *Moore's Federal Practice* §608.02; Ledd, *Some Observations on Credibility: Impeachment of Witnesses,* 52 Corn. L.Q. 239, 241 (1967). Indeed, at least one judicial observer has noted that F.R. Evid. 608 clearly contemplated the use of psychiatric testimony. James, *Judicial Conference,* 48 F.R.D. 39, 63 (2d Cir. 1969).

The defense did not suggest that McBride was incompetent to testify. Indeed, they conceded that he was, and that concession is repeated here. *See District of Columbia v. Arms,* 107 U.S. 519, 27 L. Ed. 618 (1883); *Shuler v. Wainwright,* 491 F. 2d 1212 (5th Cir. 1974); *Gurleski v. United States,* 405 F. 2d 252, 267 (5th Cir. 1968).

But together with the exceptionally broad rule of competency (F.R. Evid. 601), there should be a concomitant increase in judicial sensitivity to a criminal defendant's ability to demonstrate whatever might be relevant concerning the credibility of a given witness.

> "That the court has found the witness to possess the minimal degree of capacity to testify should not foreclose a showing that because of a mental defect or disorder his testimony is so untrustworthy that it should be given little weight." Weinhofen, *Testimonial Competency and Credibility,* 34 Geo. Wash. L. Rev. 53, 68 (1965).

Perhaps in response to this need the last thirty years have shown an increasingly discernible tendency on the part of our courts to allow expert psychiatric opinion as to credibility and the character traits of a witness. *See Richardson, Modern Scientific Evidence,* §8.28 (1961). This is as it should be, because it may be difficult, if not impossible, for the untrained observer to detect aberrations in the demeanor or social attitude of a mentally disturbed witness. Thus, it has been held that expert testimony as to the mental unsoundness of a witness is admissible for the purpose of impeaching his credibility and, while even a mentally ill witness will not generally be excluded from the witness stand, the defendant should be allowed to bring evidence of such illness to the attention of the jury. *United States v. Hiss,* 88 F. Supp. 599 (S.D.N.Y. 1950), *aff'd.,* 185 F. 2d 822 (2nd Cir. 1950), *cert. den.,* 340 U.S. 948, 95 L. Ed. 683 (1951).

United States v. Hiss, 88 F. Supp., *supra,* was the first federal case to deal with the question of the use of scientific testimony to impeach the credibility of a witness. The principal witness was a man named Whittaker Chambers, and the prosecution was almost wholly dependent upon his testimony. The defendant did not challenge Chambers' competency to testify. However, he sought to attack Chambers' credibility by offering the testimony of a psychiatrist concerning an in-court observation of the witness. Though the psychiatrist had never examined Chambers, the court allowed him to testify. Interestingly, the defense expert utilized the device of a hypothetical question involving twelve symptoms[2]

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2. These twelve symptoms were: (1) repetitive lying, (2) stealing, (3) withholding truth, (4) insensitivity to the feeling of others, (5) play acting and assuming false names, (6) bizarre and unusual acts, (7) vagabondage, (8) instability of attachment, (9) pan-handling, (10) abnormal emotionality, (11) paranoid thinking, and (12) pathological accusation. Weinhofen, *supra* at 69 n. 85.

to arrive at the conclusion that Chambers was a "Psychopathic personality." However, such opinions as are based upon observations of courtroom behavior or upon hypothetical questions are particularly vulnerable to attack and even ridicule by the other side as inadequate or even unethical. Weinhofen, *supra* at 69.

There seems to be consensus among commentators on the issue that there is simply no substitute for a full clinical examination of the witness by the expert. Weinhofen, *supra,* at 69. Jones, *Admission of Psychiatric Testimony in Alger Hiss Trial,* 11 The Alabama Law 212 (1950).

An interesting case in this area is *United States v. Lochoco,* 542 F. 2d 84 (D.C. Cir. 1976). There, the trial court permitted the defense to present three psychiatrists as witnesses in support of the defendant's defense of insanity. This was deemed by both the trial judge and the Court of Appeals to be fully authorized by F.R. Evid. 608, (A) notwithstanding the defendant's exercise of his absolute right not to take the stand himself. Following vigorous cross-examination of those witnesses by the Government, the defendant next offered the testimony of a fellow worker relating to the defendant's reputation for truthfulness and honesty. The trial court sustained the Government's objection upon the grounds of relevancy. The Court of Appeals found error in rejecting this proffer and remanded the matter for a new trial.

Lochoco, 542 F. 2d, *supra,* demonstrates what the petitioner contends is a new judicial appreciation for the value of expert psychiatric opinion on the issue of veracity. Although not elaborated upon in the court's opinion, it is suggested that both the trial judge and appellate court were no doubt more comfortable with endorsing this kind of evidence when it was the result of a full clinical examination of the subject rather than pure observation or responding to hypothetical questions. Of course,

the former is precisely the kind of examination requested by the defense herein.

Another noteworthy case in this area is *United States v. Barnard*, 490 F. 2d 907 (9th Cir. 1973). There, the court rule that it was not a manifest abuse of the trial judge's discretion to exclude a defense proffer of expert psychiatric testimony in an attack upon the Government's key witness. However, the basis for this ruling is enlightening. First, the court noted that the expert's knowledge about the witness was limited, having been gleaned from a review of the witness' army records, his grand jury testimony, and in-court observation. *Id.* 912-913. The defense here, on the other hand, urged a full, clinical evaluation of McBride. Secondly, and most importantly, the holding in *Barnard* pre-dates the effective date of the Federal Rules of Evidence (July 1, 1975) by a considerable period of time, and the trial court's ruling obviously does so by an even longer period. As has been noted, the Federal Rules of Evidence were intended to introduce "for the first time a modern, rational, and well conceived set of uniform evidence rules for the trial of . . . criminal cases." 10 *Moore's Federal Practice* §1. It is respectfully urged that the judge below erroneously failed to adopt this modern approach specifically envisioned by the provisions of F.R. Evid. 608(a).

Various state courts have held that their respective trial courts were possessed with the inherent power to compel a witness to submit to a psychiatric evaluation of his mental condition, and the results to be examined with reference to his credibility. *See, e.g., State v. Franklin*, 49 N.J. 286, 229 A. 2d 657 (1967); *State v. Butler*, 27 N.J. 560, 143 A. 2d 530 (1958); *Ballard v. Superior Court*, 64 Cal. 2d 159, 410 P. 2d 838 (1966); *Mangrum v. State*, 227 Ark. 381, 299 S.W. 2d 80 (1957); *State v. Burno*, 200 N.C. 267, 156 S.E. 781 (1931). *Cf., United States v. Dildy*, 39 F.R.D. 340 (D.D.C. 1966).

While there can be no question that the issue of competency is one of law and thus one to be determined by the trial judge, the credibility of a witness is for the jury and the jury alone. *United States v. Benn,* 476 F. 2d 1127, 1130 (D.C. Cir. 1973). These questions must be kept separate and distinct, and "although the use of expert psychiatric testimony does not fall within the traditional pattern of impeachment, the law should be flexible enough to make use of new resources." *Weinhofen, supra* at 68.

While the trial judge herein did not articulate the specific reason for denying defense counsel's application, other than a general denial, nor did he concern himself with the possibility of an invasion of the witness' privacy, we would note to this Court that concerns about the witness' privacy are irrelevant to the relief that was requested below.

Furthermore, in answer to the standard arguments against the examinations as stated hereinabove, it would appear that in this case the type of relief sought is not nearly so stringent as that which has been afforded to law enforcement authorities by the Supreme Court. For example, the Supreme Court has required a defendant, presumed innocent, to submit to various types of physical examinations with a concomitant loss privacy. *E.g., Schmerber v. California,* 384 U.S. 757, 16 L. Ed. 2d 908 (1966); *United States v. Dionisio,* 410 U.S. 1, 35 L. Ed. 2d 67 (1973); and *United States v. Mara,* 410 U.S. 19, 35 L. Ed. 99 (1973).

While there should certainly be concern for the right to privacy of a witness, the trial courts have exaggerated the potential effect of a court-ordered psychiatric examination, particularly with an individual such as McBride. On the other hand, fundamental fairness and a concern for the rights of a criminal defendant, particularly where there was an indication that the principal witnesses against him were unstable and inclined to erratic actions, mandated the granting of the requested relief.

II.

The colloquy at the time of sentence, between the court and defense counsel, indicated a prediliction on the part of the court that the petitioner was not sincere in his religious proclivities. Under the circumstances, we believe that the sentencing procedure was unconstitutional.

We can appreciate the fact that a court has the right to consider even hearsay at the time of sentence (*Townsend v. Burke,* 334 U.S. 736 (1948); and *Williams v. New York,* 337 U.S. 241, 246-247). Nevertheless it is required that due process be accorded to the petitioner at the time of sentencing [*see* 81 Harv. L. Rev. 821 (1968)].

We believe that in view of the fact that the court engaged in a dispute with defense counsel about the sincerity of the petitioner's religious proclivities and beliefs, it had no place in the sentencing procedure and, accordingly, the sentencing itself violated constitutional safeguards under the Fifth Amendment Due Process Clause.

III.

The evidence against the petitioner was insufficient as a matter of law but, to exacerbate this aspect, the petitioner was denied a fair trial because of his inability to call the witness, Fiattarone, or to interview in advance of trial the witness, Soba. This was an infringement of the Fifth and Sixth Amendment rights of the petitioner.

The witness, Soba, had testified at the prior trial. The petitioner sought to interview Soba prior to the second trial because of the fact that there appeared to be inconsistencies which he wanted to resolve and also wished to prepare properly for retrial.

Under the Sixth Amendment of the United States Constitution, any defendant accused of crime has a right to confront the witnesses against him and to have proper assistance of counsel (*Pointer v. Texas,* 380 U.S. 400, 13 L. Ed. 2d 923).

In the case of Fiattarone, the petitioner had sought to call him as a witness, but was unable to do so because of the trial court's ruling that since he had not availed himself of that opportunity during the prosecution's case, that it was now too late to do so.

Fiattarone had been granted immunity by the prosecution, but had testified outside the presence of the jury. Defense counsel was unable to reach Fiattarone when he wanted to use him later on, and asked the court's permission to read his testimony which he had given in an adversary proceeding previously. This the court also refused to do.

We believe that this, too, deprived the petitioner of proper confrontation and of compulsory processes to secure witnesses, to say nothing of his due process rights to a fair trial (*Chambers v. Mississippi,* 401 U.S. 284, 35 L. Ed. 2d 297).

The evidence against the petitioner did not spell out the particular conspiracy in which it was alleged that the petitioner was a participant, nor would the court charge that the jury must find that petitioner was involved in a particular conspiracy.

We maintain that this, too, revealed that there was insufficient evidence against the petitioner, because without some nexus to the conspiracy charge in the indictment, there could be no conviction of the petitioner [*Kotteakos v. United States,* 328 U.S. 750 (1946)].

CONCLUSION

The petition for certiorari should be granted and upon review of the proceedings below, the judgment of conviction should be reversed.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

CERTIFICATION

IRVING ANOLIK, an attorney at law duly admitted to practice in this Court, certifies that a true copy of this petition was served upon the Solicitor General of the United States on the 15 day of March, 1983, by forwarding this petition by First Class Mail properly addressed to the Office of the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

DATED: March 15, 1983.

s/ Irving Anolik
IRVING ANOLIK

APPENDIX

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the seventeenth day of January, one thousand nine hundred and eighty-three.

Present:

HON. STERRY R. WATERMAN

HON. IRVING R. KAUFMAN

HON. JON O. NEWMAN

Circuit Judges.

No. 82-1170

Filed Jan. 17, 1983

UNITED STATES OF AMERICA,

Respondent-Appellee,

v.

NICHOLAS LANZIERI,

Petitioner-Appellant.

Order Denying Rehearing

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner-appellant, Nicholas Lanzieri,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

s/ Francis X. Gindhart
Chief Deputy Clerk

ORDER OF AFFIRMANCE

UNITED STATES COURT OF APPEALS

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of November, one thousand nine hundred and eighty-two.

Present:

HONORABLE STERRY R. WATERMAN,

HONORABLE IRVING R. KAUFMAN,

HONORABLE JON O. NEWMAN,

Circuit Judges.

82-1170

Filed Nov. 12, 1982

UNITED STATES OF AMERICA,

Appellee,

v.

NICHOLAS LANZIERI,

Appellant.

Order of Affirmance

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

OPINION OF THE COURT

1. Appellant urges the government adduced insufficient evidence to permit the jury to conclude he knew the silver shipment was stolen. He claims the only evidence directly implicating him in the conspiracy was McBride's testimony that appellant paid for quantities of silver on five occasions. This characterization ignores a number of details. The night of the theft, acting on Lanzieri's instructions, McBride delivered the silver to the Overseas Cargo warehouse, arriving well after normal business hours, at approximately midnight. McBride produced no documentation and received no receipt for the silver from the man with whom he left it. The jury could reasonably have concluded that individual was performing this task on Lanzieri's instructions, and the furtive and irregular transfer of the goods certainly support the inference of knowledge of the illegal nature of the transaction. *See e.g., United States v. DeKunchak,* 467 F.2d 432, 436 (2d Cir. 1972). Moreover, the purchase of a very large quantity of a precious metal for approximately $100,000 from a man Lanzieri knew to be a truckdriver with a modest weekly salary comports with the jury's conclusion of guilty knowledge. In sum, appellant has not met his very heavy burden of demonstrating insufficiency of evidence. *United States v. Losada,* 674 F.2d 167, 173 (2d Cir.), *cert. denied,* 102 S. Ct. 2945 (1982).

2. Lanzieri's second claim is that Fiattarone's testimony should have been read to the jury. This contention is without merit. Fiattarone had been interviewed prior to trial by the government, and his denial of any involvement in the July 17 theft was communicated to Lanzieri in *Brady* material. Appellant was therefore on notice of the existence of this potentially favorable witness, *see United States v. LeRoy,* 687 F.2d 610, 618 (2d Cir.

1982), yet made no effort to subpoena him and offers no explanation for this omission. Having failed to subpoena Fiattarone, Lanzieri cannot now contend the witness's testimony was not "available" to him within the meaning of Fed. R. Evid. 804(b)(1). The district court did not err by refusing to read Fiattarone's testimony to the jury. *See United States v. Myers,* Nos. 81-1342-47, slip op. at 4652 (2d Cir. Sept. 3, 1982).

3. Judge Costantino properly instructed the jury on conspiracy. His detailed charge left no doubt that the conspiracy referred to involved the events of the night of July 17, 1980. The district court specifically linked the conspiracy to the underlying substantive crime and thereby clearly instructed the jury it must find Lanzieri guilty of the conspiracy charged and not some other. *See United States v. Gentile,* 530 F.2d 461, 469-70 (2d Cir. 1976).

4. Appellant offers no support for his contention that Judge Costantino should have permitted a psychiatric examination of McBride, based only on counsel's lay opinion that McBride's self-admitted claustrophobia and fear of being sentenced to a prison term may have compelled perjurious testimony. The district court acted well within its discretion in refusing the request, absent any scientific support for appellant's position.

5. Lanzieri's other claims are entirely without merit.

6. The judgment of conviction is affirmed in all respects.

STERRY R. WATERMAN

s/ Irving R. Kaufman
IRVING R. KAUFMAN

s/ Jon O. Newman
JON O. NEWMAN,
Circuit Judges.

RELEVANT STATUTORY PROVISIONS

§659. Interstate or foreign shipments by carrier; State prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game,

from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

§2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud

that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only

after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.